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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 488

UNITED STATES OF AMERICA,
Petitioner,

vs.

THE CITIZENS NATIONAL BANK OF EVANSVILLE,
AS EXECUTOR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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OPINIONS BELOW.

The Findings of Fact and Conclusions of Law of the District Court are not officially reported. The opinion of the Court of Appeals is reported at 359 F. 2d 817.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Whether a bequest by a decedent to his surviving spouse of a specific monthly amount for life ($200.00 per month) from the corpus of a testamentary trust constituted, for the purpose of the marital deduction under the Federal Estate tax, bequest of "all the income from a specific portion" of the trust, within the meaning of Section 2056(b)(5) of the Internal Revenue Code of 1954.

STATUTE AND REGULATION INVOLVED.

The pertinent provisions of the statute and regulations involved, Sections 2056(a), (b)(1), (b)(5) and (c), of the Internal Revenue Code of 1954 and portions of Treasury Regulations (1954) Sections 20.2056(b)-5(a), (b), (c), (d) and (f), are set forth in the Petition in Appendix C.

STATEMENT.

G. Ashburn Koch died testate on September 25, 1959, survived by his widow, Mary Jane Koch, who was the sole beneficiary under his residuary trust created by his will which provided, in part, as follows:

> "In the event I die prior to October 1, 1961, I direct my Trustee to pay to my wife the sum of Two Hundred Dollars ($200.00) per month up to and through December 1, 1964, and then to pay to my wife the sum of Three Hundred Dollars ($300.00) per month after December 1, 1964, each and every month for the duration of her life. * * * Provided, however, anything hereinbefore set out notwithstanding, I order and direct that my wife, Mary Jane Koch, shall never receive less than the income produced from the corpus of my trust estate on and after December 1, 1964."

The Trustee was directed by the will to invest the trust estate so as to produce an income of at least four per cent

(4%) per annum and the decedent gave his wife a general testamentary power of appointment over the entire trust corpus. The value of the residuary trust estate was some One Hundred Twenty-Three Thousand Five Hundred Dollars ($123,500.00) and the sole issue is whether the right in decedent's widow to receive from his testamentary trust the sum of Two Hundred Dollars ($200.00) per month for life, with the power to appoint all the remainder of the trust, qualified for the marital deduction as a "specific portion" of the trust within the meaning of Section 2056 (b)-5 of the Internal Revenue Code of 1954. In all other respects, the trust qualified for the marital deduction without question. The surviving widow was the sole beneficiary of the trust created by the decedent and is the only person entitled to any trust income and was given the power of appointment over the entire principal remaining at her death. She was also given all of the income of the trust after December 1, 1964. It is only the fact that her income from the trust prior to December 1, 1964, was limited to a specific sum of Two Hundred Dollars ($200.00) per month that a question arises concerning the qualification of the trust, or apart thereof, for the marital deduction.

The basic principle underlying the marital deduction is that the spouse first to die shall be permitted to pass on to the surviving spouse, free of estate tax, up to one-half of his or her estate, provided only that the terms of the transfer are such that this property will be taxable in the estate of the surviving spouse. Section 2056(b)-5, of the Internal Revenue Code of 1954, allows the marital deduction to apply when the surviving spouse has the income for life from a "specific portion" of the trust with the power to appoint the remainder of the trust. A fixed income per month to a surviving spouse qualifies as the income from a "specific portion," inasmuch as such

"specific portion" can be mathematically computed and the regulations of the Internal Revenue Code recognize such computation for income tax, gift tax and estate tax purposes. The regulations of the Internal Revenue Code attempting to restrict the definition of "specific portion" to a portion or percentile share are not fairly within the statutory meaning and are unreasonable and do not express the congressional intent. The purpose of the marital deduction was to extend to married taxpayers in common-law states the advantages of residents of community property jurisdictions by permitting a surviving spouse to acquire free from Federal Estate taxation up to one-half of what is referred to as "the adjusted gross estate" of the deceased spouse.

This case falls squarely within the legislative intent and the trust set up by decedent is a practical expression of a gift of income couched in monthly payments. Inasmuch as the widow has the power to appoint the entire corpus of the trust and is entitled to Two Hundred Dollars ($200.00) a month for life plus all of the income after December 1, 1964, the only question is to calculate and set aside for marital deduction purposes that portion of decedent's trust which will produce Two Hundred Dollars ($200.00) a month. This the District Court below and the Seventh Circuit Court of Appeals below have adequately and correctly done.

I.

There Is No Conflict of Decision.

The Government asserts that there is a conflict of decisions between this case and the case of *Northeastern Pennsylvania National Bank & Trust Co.* v. *United States.* (Petitioner's Brief, App. B.) On the surface it might appear that there is a similarity between the fact situations, inasmuch as in the *Koch* case the decedent's widow was be-

queathed Two Hundred Dollars ($200.00) per month until December 1, 1964, and thereafter all the income from the trust and in the *Northeastern* case the widow was bequeathed Three Hundred Dollars ($300.00) per month, as a flat sum for life. However, there the similarity ends and the cases are easily distinguishable as follows:

A. In the *Koch* case, the value of the residuary trust was some $123,500.00, which is sufficient to produce a monthly income of Two Hundred Dollars ($200.00) per month even at two per cent (2%) return. Therefore, that specific portion of the trust estate, that is, $68,572.00 at three and one-half per cent (3½%) return (the percentile figure recognized by the Internal Revenue Service) will produce Two Hundred Dollars ($200.00) a month without the invasion of any of the corpus and the corpus of the trust would remain intact, to fluctuate with the rise and fall of the market and to be taxable in the estate of the widow at her death.

In the *Northeastern* case, the value of the trust was insufficient to produce income of Three Hundred Dollars ($300.00) a month and the method of determining the specific portion was a formula that amounted to capitalizing at three and one-half per cent (3½%) the sum of Three Hundred Dollars ($300.00) per month in monthly payments during the life expectancy of the widow (actuarily calculated) in the form of an annuity, so that the entire trust fund would have been dissipated and paid to the widow by the time of her death. As the Court of Appeals for the Third Circuit rightfully noted, this formula is not a method of determining the portion which will produce an income that the decedent directed, but is a method which will require the corpus to be invaded to make up the difference between the income yield and the monthly income bequeathed to the widow. Such a formula does fly into the face of the congressional intent concerning terminable in-

terests in marital deduction problems and would allow this portion of the decedent's estate to escape Federal Estate tax both on the death of the decedent and on the death of decedent's spouse. This is *not* the *Koch* case, where the taxation on the decedent's interest is merely postponed until the death of the decedent's widow.

B. In the instant case, the decedent, G. Ashburn Koch, directed his Trustee to invest his trust estate so as to return at least four per cent (4%) income, an amount of income which would produce more than twice the monthly payments bequeathed to the widow; whereas, in the *Northeastern* case no directions were given to the Trustee and because of the insufficiency of the trust estate, the trust estate would be unable to produce the amount of monthly income bequeathed to the widow at any reasonable income percentage without the invasion of the trust estate.

C. The will, in the *Northeastern* case, allowed the executor to invade the principal of the trust for illness and financial emergencies, an unknown factor, as pointed out by the Appellate Court. In the *Koch* case no such discretion was given the executor, a further indication that the trust fund would rise and fall with the market to await full taxation at the death of the widow.

D. In the *Koch* will the widow was to get *all* of the income from *all* of the trust after December 1, 1964, whereas the will in the *Northeastern* case had no such direction.

II.

The Decision of the Court Below Was Correct.

The purpose of the marital deduction was to extend to married taxpayers in commonlaw states the advantages of residents of community property jurisdictions by permitting a surviving spouse to acquire free from Federal

Estate taxation one-half of the adjusted gross estate of a deceased spouse. A marital deduction may be disallowed if there are terminable interests, that is, interests which will terminate or fail on the lapse of time or on the occurrence of some contingency.

> "* * * Generally speaking, the 'terminable interest' concept was devised for the purpose of assuring that if the property bequeathed to the spouse was to be excluded from the gross estate of the decedent, it would be adequately integrated in the spouse's estate so that on her death, it would not escape the death tax a second time. 'The basic principle . . . is that the spouse first to die shall be permitted to pass on to the surviving spouse free of estate tax up to one-half of his or her estate provided only that the terms of the transfer are such that this property will be taxable in the estate of the surviving spouse.' "
>
> *Dougherty* v. *United States,* 292 F. 2d 337.

The Committee Reports accompanying the Revenue Act of 1948 discussing the marital deduction stated in part:

> ". . . This provision is designated to allow the marital deduction for such cases where the value of the property over which the surviving spouse has a power of appointment will (if not consumed) be subject to either the estate tax or gift tax in the case of such surviving spouse."[1]

As pointed out herein, there is no terminable interest in this case. The entire amount of the trust estate created by G. Ashburn Koch will ultimately be taxed in the estate of his widow, Mary Jane Koch, at her death.

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1. Senate Report No. 1013, 80th Cong., 2nd Sess., 2 U. S. C. Cong. & Admin. News (1948), p. 1238.

III.

No Important Federal Question Is Involved.

Petitioner, in its brief, has little to say as to why this minor issue should be considered by and take the time of this Court. On page six (6) of its brief Petitioner says:

> "The Treasury Regulation here in question has presumably discouraged most estate planners from using bequests of a fixed amount of income plus a general power of appointment."

Thus, by its own petition, the Government admits that the number of people who would be affected by the *Koch* decision is very small. The language of the statute which is in question has no general application in any other situation, context or statute. Therefore, the impact of the decision is of great interest to Mary Jane Koch, the widow, but of only academic interest generally.

If the Government feels the decision of the *Koch* case is wrong it, of course, can request Congress to amend the statute. It should not ask this Court to do its amending for it.

The Treasury's definition of the term "specific portion" is void as an attempt to make law, rather than to carry into effect the express intent of Congress in liberalizing the marital deduction concept. As set out in *Gelb* v. *Commissioner of Internal Revenue,* 298 F. 2d 544 (C. A. 2d):

> ". . . The liberalization in the provision as to trusts, made in the 1954 Code and applied to earlier years by the Technical Amendments Act, was evidently designed to permit certain normal testamentary dispositions without the total forfeiture of the deduction that the 1939 Code had occasioned in some instances. That Congress gave a fractional interest as an example

of a 'specific portion' does not warrant a construction that Congress did not mean to include other instances fairly within the language and the underlying policy. We disapprove Regulations 105, § 81.-47a(c), (3) (1954 Code—Regulation 20.2056(b)-5(c)) insofar as it would limit a 'specific portion' to a 'fractional or percentile share.' "

The bequest of a dollar amount per month from a trust of a size more than adequate to provide such dollar amount is obviously a bequest of income from a "specific portion" of such trust.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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